



In The Supreme Court of Bermuda

CRIMINAL JURISDICTION

Case No. 34 of 2019

BETWEEN:

THE QUEEN

-and-

JAMES ROBERT RUMLEY

Before: **The Hon. Justice Juan P. Wolffe, Acting Puisne Judge**

Appearances: Ms. Cindy Clarke for the Prosecution
 Ms. Victoria Greening for the Defendant

Date of Hearing: 5th August 2020

Date of Ruling: 13th August 2020

Date of Reasons: 28th August 2020

RULING

Defendant's right to bail – Delay – Possibility of jury trials not being heard during the remainder of 2020 due to the COVID-19 pandemic – Defendant not having the opportunity or facility to give instructions to Counsel

WOLFFE, AJ.

1. On the 13th August 2020 I declined the Defendant's application for bail and set out herein are my reasons for doing so.
2. The Defendant is currently in custody at the Westgate Correctional Facility ("Westgate") awaiting a trial in respect of three (3) counts of Unlawful Importation of a Firearm, contrary to section 3(1)(b) of the Firearms Act 1973 (the "FA"). The alleged offences involved the importation of component parts of a firearm on three (3) separate occasions: 3rd June 2019, 14th October 2019, and the 17th October 2019.
3. By way of a Summons dated 23rd July 2020 and supported by an affidavit sworn on the 24th July 2020 the Defendant applied for bail on the grounds that:
 - (a) There will be a delay in the hearing of his trial due to the COVID-19 precautionary measures being taken by the Supreme Court in respect of the conducting of jury trials.
 - (b) Due to COVID-19 precautionary measures being taken by Westgate visits are restricted, and, that when he has had contact with the "outside world" he had to be placed in quarantine for 23 hours of the day in the maximum security unit.
 - (c) Other defendants awaiting trial and who have been charged with much more serious offences than the Defendant have been granted bail.
4. As will be seen later, this bail application constitutes the Defendant's third bail application ("Third Bail Application").

The Defendant's Right to Bail

5. As I noted in my recent ruling in the matter of *R v. Jahmico Trott (Case No. 27 of 2017 & Case No. 10 of 2019)(18th August 2020)*, pursuant to section 6 of the Bail Act 2005 (the “Bail Act”) every person charged with a criminal offence has a general right to bail. Read with Clause 6 of the Bermuda Constitution Order 1968 (the “Bermuda Constitution”), which provides that any person charged with a criminal offence “*shall be presumed to be innocent until he is proved or he has pleaded guilty*”, the starting point must therefore be that a person will be granted bail unless there exists exceptions to the right to bail which are set out in Schedule 1, Part 1 of the Bail Act.

6. In respect of the exceptions to the right to bail, paragraphs 2 to 9 of Part 1 of Schedule 1 of the Bail Act provides the following:
 - “2. *The defendant need not be granted bail if the offence is—*
 - (a) *murder*
 - (b) *an offence under the Firearms Act 1973;*
 - (c) *or a serious arrestable offence, within the meaning of section 3 of the Police and Criminal Evidence Act 2006, involving the use of a firearm or ammunition, within the meaning of section 1 of the Firearms Act 1973.*

 3. *The defendant need not be granted bail if the court is satisfied that there are substantial grounds for believing that the defendant, if released on bail (whether subject to conditions or not) would—*
 - (a) *fail to surrender to custody; or*
 - (b) *commit an offence while on bail; or*
 - (c) *interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person.*

 4. *The defendant need not be granted bail if—*
 - (a) *the offence is an indictable offence or an offence triable either way; and*
 - (b) *it appears to the court that he was on bail in criminal proceedings on the date of the offence.*

5. *The defendant need not be granted bail if the court is satisfied that the defendant should be kept in custody for his own protection or, if he is a young person, for his own welfare.*

6. *The defendant need not be granted bail if he is in custody in pursuance of the sentence of a court.*

7. *The defendant need not be granted bail where the court is satisfied that it has not been practicable to obtain sufficient information for the purpose of taking the decisions required by this Part of this Schedule for want of time since the institution of the proceedings against him.*

8. *The defendant need not be granted bail if, having been released on bail in or in connection with the proceedings for the offence, he has been arrested in pursuance of section 10.*

Exception applicable only to defendant whose case is adjourned for inquiries or a report

9. *Where his case is adjourned for inquiries or a report, the defendant need not be granted bail if it appears to the court that it would be impracticable to complete the inquiries or make the report without keeping the defendant in custody.”*

7. Paragraph 11 of Part 1 of Schedule 1 of the Bail Act provides statutory guidance as to what factors the Court should have regard to when considering paragraphs 3 and 4 above. Such as:

- “(a) the nature and seriousness of the offence or default (and the probable method of dealing with the defendant for it);*
- (b) the character, antecedents, associations and community ties of the defendant;*
- (c) the defendant’s record as respects the fulfilment of his obligations under previous grants of bail in criminal proceedings;*
- (d) except in the case of a defendant whose case is adjourned for inquiries or a report, the strength of the evidence of his having committed the offence or having defaulted,*
as well as to any others which appear to be relevant.”

The Prosecution's case against the Defendant

8. The Prosecution's Summary of Evidence which appears on the Court file alleges that the Defendant resides in Pittsburg, Pennsylvania in the United States of America, and that on the 3rd June 2019 investigators from the Bermuda Police Service ("BPS") intercepted a package at the Federal Express ("FedEx") facility in Mills Creek, Bermuda. This package originated from St. Greensburg, Pennsylvania and was addressed to a Jerome Harvey in St. George Parish in Bermuda. The contents were listed as a shower head with assembly and installation parts, but when the package was examined it actually contained two (2) independent handgun receivers. A check of CCTV recordings at the FedEx station in West Mifflin, Pennsylvania purportedly showed the Defendant shipping the said package to Bermuda.
9. It is further alleged that on the 14th October 2019 police officers of the BPS intercepted another package at the same FedEx facility in Bermuda and when inspected the package was found to contain component parts of firearms, specifically two (2) "slides". This package originated in Pittsburg, Pennsylvania, where the Defendant resides, and was shipped to a Nyna Lightbourne in Bermuda. Ms. Lightbourne is the mother of the Defendant's ten (10) year old daughter. This package was delivered to Ms. Lightbourne's address as per normal by FedEx but it was accepted by another homeowner on behalf of Ms. Lightbourne. Later that day the police executed a warrant at Ms. Lightbourne's house and the package was intact. Ms. Lightbourne informed police that she received a What's App message from the Defendant earlier in the day informing her that he had sent the package to her address, and, that later on in the day he sent another What's App message telling her that the package had been delivered to her address. The Defendant did not disclose the contents of the package to Ms. Lightbourne.
10. The Prosecution finally allege that on 17th October 2019 the police intercepted another package at FedEx in Bermuda which originated from Pittsburgh, Pennsylvania and was shipped to the Defendant at an address on Spring Benny Bay Road in Sandy's Parish. The package contained component parts for two trigger mechanisms of handguns which had

been dissembled into moving parts. The Defendant was arrested later that day and when cautioned he said the words “*I was going to give myself up as I know you guys were looking for me*” and “*I know what this is about. I sent that to the wrong place. I meant to send it to California*”.

11. The Prosecution have maintained throughout the proceedings that the nature of the offences are serious and that the strength of the evidence against the Defendant is strong.

History of the Proceedings

12. When the Defendant appeared in Magistrates’ Court for the first time on 21st October 2019 the Prosecution objected to bail on the following grounds:

- (i) The offences charged were under the FA.¹
- (ii) There were substantial grounds that the Defendant would not surrender to custody as he entered Bermuda on a United States passport as a visitor, and, already had various outstanding warrants.²
- (iii) There were substantial grounds that the Defendant would interfere with witnesses or otherwise obstruct the course of justice.³

13. The Defendant did not make any application for bail on this first appearance on the offences charged, and, it did not appear that he had any formal legal representation.⁴ An order was made for the matter to be sent to the 2nd December 2019 Arraignment session in the Supreme Court.

¹ Paragraph 2(b) of Part 1 of Schedule 1 of the Bail Act

² Paragraph 3(a) of Part 1 of Schedule 1 of the Bail Act

³ Paragraph 3(c) of Part 1 of Schedule 1 of the Bail Act

⁴ Duty Counsel is usually in Plea Court each morning and therefore it is possible that the Defendant received some preliminary legal advice. A note on the Court file indicates that Ms. Susan Mulligan was his lawyer (although she was not in Court) and that the Defendant had a heart issue and needs to travel abroad for treatment.

14. On or about the 25th November 2019 lawyer Mr. Marc Daniels, on behalf of the Defendant, filed into the Supreme Court a Summons supported by a sworn affidavit of the Defendant dated 24th November 2019, and an affidavit of Mr. Daniels sworn on the 27th November 2019, requesting for a bail application to be made (the “First Bail Application”). The grounds of the First Bail Application were as follows:

- (i) The Prosecution’s evidence is tenuous.
- (ii) The Defendant had strong ties to Bermuda in that the whole side of his mother’s family resides in Bermuda, and that if granted bail he would be able to reside with his brother or with his grandmother. The Defendant added that he does not have any desire to run from his case as he does not wish to be considered a “fugitive”.
- (iii) The Defendant has four (4) children, three of which reside in the US and to whom he frequently travels, and one who resides in Bermuda.
- (iv) The Defendant has his own business in the US which he needs to manage.
- (v) The Defendant has never been convicted of any criminal offences before.
- (vi) There are persons who are willing and able to stand surety for him if granted bail.

The Defendant also stated in his affidavit that he would appreciate the opportunity to travel to the US from time to time to receive medical treatment because since 2005 he has suffered from a heart condition known as Second Degree Atrioventricular (“AV”), and, that he also suffers from severe Spinal Damage and Therasic Outlet Syndrome (“TOS”). He also said that he was recently been informed while at Westgate that he is pre-diabetic, and that he is not able to receive the required care, medication and treatment at Westgate.

In his affidavit Mr. Daniels stated that while he was at Westgate with the Defendant that the Defendant started to have heart complaints and that he [the Defendant] collapsed into his arms. Mr. Daniels stated that he was later informed that the Defendant suffered a “mini heart attack”.

15. On 2nd December 2019 the Defendant appeared in the Supreme Court represented by Mr. Bruce Swan who was holding for Mr. Daniels. Nothing of consequence occurred and the matter was adjourned to the 6th January 2020.
16. On the 23rd December 2019 the Defendant’s First Bail Application commenced before the Hon. Justice Mrs. Charles-Etta Simmons. After hearing brief submissions from Counsel Simmons J. ordered the following:
 - (i) The Defendant is to provide details of: any and all medication that he is required to take for his medical challenges set out in his affidavit; how often he is required to take the medication; and, any and all medication he was then receiving whilst on remand at Westgate.
 - (ii) The Defendant is to provide details as to the location of his passport.
17. The Defendant’s First Bail Application was then adjourned to the 27th December 2019 and on that date Mr. Daniels informed the Court that the medical reports did not support the Defendant’s statement that he has a heart condition, and that the Defendant was receiving sufficient nutrition whilst at Westgate. In this regard, a medical report of Dr. Prabhakar Reddy Kayam dated 23rd December 2019 reported, *inter alia*, the following:

“Mr. Rumley reported that he has history of heart problems and was on 6 different medications, but didn’t bring them or use them during his travel to Bermuda. He was unable to tell names and all attempts through multiple sources to obtain his medical information were unsuccessful, including his family members living in USA; Mr. Rumley didn’t appear fully co-operative in view of evasiveness and unreliable history.”

“He was reviewed by Cardiologist on Nov 26 2019 and as per the consultation report, his cardiac investigations done on Nov 26 2019 didn’t show any heart ischemic changes.”

18. However, Mr. Daniels advanced the grounds set out in the Defendant’s affidavit and in his written submissions dated 25th August 2019.
19. The Prosecution countered Mr. Daniel’s submissions by essentially expanding upon their objections made in the Magistrates’ Court on 21st October 2019. Specifically, Ms. Clarke submitted that:
 - The Defendant is charged with serious offences which attract a maximum sentence of 17 years imprisonment.
 - If the Defendant is given “carte blanche” to travel then he would fail to surrender to custody. In this regard, the Court’s attention was drawn to two (2) warrants issued for the Defendant’s non-appearance (as indicated in the sworn affidavit of Detective Constable 2074 Dean Roland Martin dated 18th December 2019).
 - There is a likelihood that the Defendant will interfere with witnesses or obstruct the course of justice because one of the main witnesses for the Prosecution is the mother of one of the Defendant’s children, and, that the Defendant was arrested at her address.
 - There was no medical evidence to substantiate the Defendant’s medical condition or that his medication is unavailable on the Island.
20. In rendering her decision not to grant bail to the Defendant on 27th December 2019 Simmons J. concluded that (i) it appeared that the Defendant was being “untruthful” or “unhelpful” regarding his health status, and “unhelpful” regarding his passport; (ii) there is a risk that he would interfere with witnesses if granted bail, and (iii) there is a risk that he would flee from the jurisdiction.

21. On the 6th January 2020 the Defendant appeared and the Court was informed by Mr. Daniels that he was not “properly instructed”. In common parlance amongst members of the Bar this essentially means that Mr. Daniels had not been or was unlikely to be paid for his legal services. The matter was adjourned to the 23rd January 2020 so that the Defendant could make an application for legal aid.
22. On the 23rd January 2020 Mr. Charles Richardson appeared for the Defendant and informed the Court that the Defendant was granted legal aid. It is unclear from the record as to the reasons why Mr. Daniels did not appear on behalf of the Defendant but one could assume that by this date he no longer represented the Defendant. The matter was adjourned to the 3rd February 2020 to set a trial date, but Counsel were to submit possible trial dates on or before 31st January 2020.
23. It does not appear that by the 31st January 2020 that Prosecution or Defence Counsel submitted possible trial dates and so the matter was scheduled to be heard on the 4th February 2020. On the 4th February 2020 Mr. Richardson advised the Court that he had been given written instructions from the Defendant to represent him. Ms. Clarke advised the Court that disclosure had already been made but that it would appear that Mr. Richardson had not received the documentation. The matter was adjourned to the 19th February 2020 so that trial dates could be submitted by Counsel.
24. On the 19th February 2020 the trial date was fixed for 18th May 2020, and a Case Management Hearing (“CMH”) was set for the earlier date of 13th March 2020. Amongst other things, the CMH was to be held in relation to the filing of the Defendant’s defence statement. However, the CMH was administratively delisted due to the illness of Mr. Richardson.⁵ Counsel were directed by the Court to submit new dates for the CMH by close of business on 16th March 2020.

⁵ Prosecution and Defence Counsel were made aware of this by way of an email dated 10th March 2020

25. On the 16th March 2020 the fixed trial date was confirmed and the Defendant was ordered to file his defence statement on or before 30th March 2020. The matter was scheduled for mention on the 1st April 2020.
26. It is unclear what precipitated it, but on the 20th March 2020 the Court wrote to Mr. Richardson stating *“In light of your current position where it relates to your health, please have someone appear on your behalf”*. This would have been in respect of the mention date of 1st April 2020, and I can only assume that this was in relation to COVID-19 precautionary measures which had just before been implemented by the Bermuda Government in or around the last week of March 2020.
27. On or about the 13th April 2020 Ms. Victoria Greening, on behalf of the Defendant, filed a “Notice of Change of Attorney” which effectively made her the Defendant’s new lawyer. On the same date Ms. Greening filed the Defendant’s Second Bail Application i.e. less than four (4) months after the Defendant’s First Bail Application. In support of this Second Bail Application the Defendant filed a second affidavit and Ms. Greening filed submissions in support of his bail application. The grounds for the Second Bail Application were as follows:
- (i) Other defendants in other cases similar to the Defendant’s where firearms offences had been charged have been granted bail.
 - (ii) The Defendant has been on remand for six (6) months and that his trial date of 18th May 2020 will be adjourned indefinitely due to uncertainty created by the COVID-19 pandemic.⁶
 - (iii) There is little risk of the Defendant fleeing the jurisdiction given the then prevailing COVID-19 border restrictions, and, that he is willing to surrender his US passport.

⁶ In his affidavit sworn on the 7th April 2020 the Defendant referred to Circular 7 of 2020 Re: COVID-19 Precautionary Measures issued by the Registrar of the Supreme Court.

- (iv) The Defendant can reside with his sister in Sandy's Parish, and she is willing and able to stand surety for him if granted bail.
- (v) The Defendant has no previous convictions.
- (vi) The Defendant was found unresponsive in his cell at Westgate, and that the prison is not an environment for a vulnerable prisoner.

28. It was not until the 19th May 2020 that the matter was next before the Court. This would have been one (1) day after the initial trial date of the 18th May 2020 which obviously did not commence. This is likely due to the fact that from the 6th April 2020, and pursuant to the Emergency Powers Regulations (COVID-19 Shelter in Place) Regulations 2020, Court operations were put on pause. It was not until "Phase 1 of the Re-opening of Bermuda on the 2nd May 2020" that the Court was able to resume limited Court services.⁷ In any event, a bail application was not made on the 16th May 2020, but rather Ms. Greening indicated that she was awaiting two (2) items of disclosure from the Prosecution and that once that was done then a defence statement would be filed (the defence statement should have been filed on or before the 30th March 2020 when the Defendant was being advised by Mr. Richardson). Ms. Clarke responded by saying that Mr. Richardson already had the disclosure. The matter was adjourned to the 4th June 2020 in respect of disclosure and the Defendant's defence statement.

29. Unfortunately, Simmons J. was unavailable for the 4th June 2020 and the matter was fixed for the 8th June 2020. On the 8th June 2020 it appears that all disclosure issues had been resolved and subsequently an order was made for the Defendant to file his defence statement on or before the 16th June 2020. The matter was listed for the 1st July 2020 so that a trial date could be fixed.

⁷ The Bermuda Government implemented four (4) phases of reopening with the last phase being on the 1st July 2020.

30. On the 22nd June 2020 the Court had reason to write to Ms. Greening because the Defendant's defence statement had not as yet been filed by the 16th June 2020 (as ordered on the 8th June 2020). Without any response from Ms. Greening, the Court yet again wrote to Ms. Greening on the 24th June 2020 as a follow-up to the Court's email of the 22nd June 2020. Presumably not hearing from Ms. Greening, the Court wrote to Ms. Greening again on the 30th June 2020 advising her that due to the default in the filing of the ordered defence statement that the matter would have to be administrative delisted from its hearing date of 1st July 2020. The Court, yet again, enquired about the filing of the defence statement. Later in the evening at 6.39pm on 30th June 2020 Ms. Greening reverted to the Court and stated that she would file the defence statement "this week" (presumably by Friday, 3rd August 2020).
31. It would appear from the Court file though that a defence statement was not filed by the 3rd August 2020, and indeed, to date a defence statement has not as yet been filed. If this is correct, it is quite curious that Ms. Greening, on behalf of the Defendant, filed the summons and affidavit which forms the basis of the Third Bail Application. Firstly, because it does not appear that the Second Bail Application (filed on the 13th April 2020) was actually heard and adjudicated upon by the Court. It is unclear as to why Ms. Greening saw fit to file an entirely new bail application and in doing so seemingly abandoning some of the grounds which were being relied upon in the Second Bail Application. Such as, the Defendant's health issues and that he will surrender his US passport. Be that as it may, by the filing of the Third Bail Application the Second Bail Application shall stand withdrawn and therefore the only bail application up for consideration now is the Third Bail Application.
32. Secondly, if the Defendant had the time and opportunity to instruct Ms. Greening and for Ms. Greening to render legal advice in respect of the Third Bail Application, then surely by now the Defendant could have instructed Ms. Greening as to the defence statement so that it could be filed as ordered, and reminded, by the Court on more than one occasion. The file does not indicate any reasonable excuse or explanation being proffered by Ms.

Greening as to the Court's order to file a defence statement being breached by the Defendant.

33. In any event, I will now move onto the grounds upon which the Defendant makes his Third Bail Application.

Delay

34. Any consideration as to delay in this matter should be carved into two (2) separate time frames: (i) whether there has been any delay thus far i.e. from when the Defendant first appeared in Magistrates' Court; and (ii) whether there is likely to be any delay in the ensuing months.

Whether there has been delay thus far

35. The Defendant has been in custody since the 21st October 2019 which was his first Magistrates' Court appearance, that is, approximately ten (10) months ago. Over that ten month period the matter, relatively speaking, has moved through the criminal justice system with reasonable expedition in consideration of all the circumstances (especially so if one takes into consideration the closure of the Courts due to the COVID-19 pandemic). In particular, as shown in the above history of the proceedings, the Defendant has: appeared in Magistrates' Court to initially face the charges against him; been sent to the Supreme Court to answer to the charges; filed three (3) bail applications (two of which have been fully heard and one of which has been abandoned⁸); instructed and received legal advice from at least three (3) different lawyers (Mr. Daniels, Mr. Richardson and now Ms. Greening); and, has had a trial date fixed. Had the COVID-19 pandemic not wreaked havoc on the Supreme Court operations, as it has done with even greater devastation in other jurisdictions, the Defendant's trial would have taken place on the 18th May 2020, which would have been a mere seven (7) months after his first appearance in Magistrates' Court.

⁸ The reasons for which I have stated above.

36. I therefore see nothing constitutionally untoward in the manner and time in which this matter has traversed through the Courts thus far. I do however find it rather audacious of the Defendant that he would now come before the Court complaining about delay when it is he, by his conduct, who has largely contributed to slowing of the pace of this matter. Firstly, it is crystal clear that the Defendant's First Bail Application, which occupied considerably time and space in the Court diary in order to be heard, was constructed on fragile ground. Simmons J. was unequivocal in her conclusion that the Defendant's was untruthful and unhelpful in respect of his health status and the whereabouts of his passport. It is no wonder that the health related grounds were dropped in the Defendant's Third Bail Application.
37. Secondly, the Defendant, despite Court orders and reminders from the Court, was and still is grossly dilatory in the filing of his defence statement. It begs the question: "If the Defendant cannot abide by Court orders whilst he is incarcerated at Westgate, then how could he possibly be relied upon to abide by Court orders or conditions if granted bail?".
38. I am therefore not satisfied that there has been any unreasonable delay up to this point in time. I will now move onto whether there is likely to be any delay in the hearing of the Defendant's trial due to COVID-19 precautionary measures being taken by the Supreme Court in respect of the conducting of jury trials.

Whether there is likely to be delay in the ensuing months

39. The issue as to whether there will be a delay in the hearing of the Defendant's trial in the forthcoming months is strikingly similar in law and fact to the issues in the authority of *Trott* which was mentioned earlier. Given this, I will be making extensive references to my ruling in *Trott* as my commentary is equally applicable to the case at bar.
40. Setting the stage as to the effects of the COVID-19 pandemic on court operations throughout the world, in *Trott* I stated that:

“20. Any consideration as to whether the Defendant has or will suffer any unreasonable delay in the hearing of his trial must be viewed through the lenses of the COVID-19 pandemic which has and mostly likely will for some unforeseeable time continue to wreak havoc on virtually every court system in the World. Court officers throughout most jurisdictions, Commonwealth and otherwise, cannot pinpoint with any degree of certainty when their respective courts will return to some semblance of normality (if indeed at all). As a direct result of lockdowns and other precautionary measures being taken, court operations in most jurisdictions came to a screeching halt which unfortunately led to horrendous backlogs in court cases being heard. Even now, most court systems are still grappling with the daunting task of scheduling matters which they were compelled to adjourn during the pandemic, and, with how the jury trial process will now look when factoring in precautionary measures such as social distancing.

21. The Bermuda Court system was and still is no different from other jurisdictions as to the impact of the COVID-19 pandemic. From the end of March 2020 the entire island effectively went on total lockdown which meant that jury trials could not be conducted. It was not until the 2nd May 2020 that Phase 1 of the “Reopening of Bermuda” commenced but this involved permission being given by the Bermuda Government for only a limited type and number of services and businesses to operate⁹. While some Supreme Court operations were being conducted remotely, in-person court appearances did not fall within those category of services that were allowed by the Bermuda Government. Therefore, jury trials still could not be conducted.

22. It was not until the implementation of Phase 3 of the “Reopening of Bermuda” on the 11th June 2020 that Government Services, and hence Court services, were allowed to be carried out. However, as can surely be appreciated, the setting of jury trials, even without the added issue of COVID-19, involves the movement of many interrelated parts. The most difficult and essential part of organizing a jury trial is the mobilization and attendance of a jury panel from which potential jurors could be selected. Placing COVID-19 into the equation increases this difficulty exponentially because the health and safety of jurors now becomes of paramount importance. In order to ensure the health and safety of jurors it is imperative (i) that strict and extensive precautionary measures are put into place to ensure proper social distancing, proper hygiene of the Court environs, and adequate supply of personal protection equipment (PPE) for jurors, and (ii) that the implementation or imposition of such precautionary measures do not hinder, encumber or negate the trial process (to the extent that jurors are unable to properly or fully receive the oral and documentary evidence upon which they will render their verdict).

⁹ The Bermuda Government gave daily COVID-19 updates through press conferences and the dissemination of public service announcements through flyers and fact sheets.

23. *Herein lies the conundrum of scheduling trials in the Supreme Court when we are currently knee deep in the throes of the COVID-19 pandemic. Not only must one find suitable dates in the Court diary to schedule trials (which is largely dependent upon the availability of Counsel and witnesses) but time and resources must be found and spent on fabricating the courtroom to ensure the health and safety of all users of the Court, especially the jurors. Moreover, the jurors themselves, some of whom may be vulnerable persons due to age and health, must be willing and able to serve as jurors, even if all precautionary measures are taken by the Court.*”

41. In his affidavit the Defendant referred to a comment purportedly made by Simmons J. in open court on the 16th July 2020 that it would be highly unlikely that any Supreme Court jury trials would take place prior to the start of 2021. To that, I said the following in *Trott*:

“24.....The Defendant’s fourth bail application arises out of a comment purported to have been uttered by The Hon. Justice Mrs. Charles-Etta Simmons on or about 16th July 2020 in open court. In paragraph 5 of the Defendant’s affidavit sworn on the 21st July 2020 he stated that Justice Simmons “announced in open court that it would be highly unlikely any Supreme Court criminal jury trials would take place until the start of next year”. The 16th July 2020 Edition of the Royal Gazette also quotes Simmons J. as saying:

““There is a real likelihood that we will not have a criminal trial in the Supreme Court this year.

“I know there may be consequences that follow from it, but having started this since the end of March, I believe my team has done as much as it can do to try to effect a useful space.”

Mrs. Justice Simmons told lawyers present in the courtroom: “It’s unfair to you to continue to ready yourselves for trial when I cannot tell you when a trial will take place.

“I accept that there will be consequences for me having said this because of the predicament the court is in. I cannot say anything more.

“Whatever the consequences are, the court will have to deal with it.””

25. *Of course one must always be careful when relying on newspaper accounts of what has transpired in Court proceedings (this should not be taken as a criticism of the media), however I did seek clarification from Simmons J. as to the likelihood of trials taking place this side of 2020 (by way of transparency I informed Mr. Pettingill and Mr. Mahoney about my conversation with Simmons J.). Simmons J. advised me that whether or not jury trials take place in 2020 heavily depends on*

whether funding is made available by the Bermuda Government in order to fabricate and reconfigure the existing courtroom at Sessions House so that it will comply with all COVID-19 precautionary measures. That is, social distancing by all users of the Court (inside the courtroom and its environs), and, by jurors in the jury deliberation room. Such would include the construction of properly spaced plexi-glass partitions to ensure social distancing of the jurors. In this regard, I am made to understand that the required plexi-glass has been set aside by a local retailer but that there is no Government funding available at this time to purchase or to construct the plexi-glass, and, that there is uncertainty as to when such funding would be available. Therefore, while there is still a possibility that jury trials may commence between September and December of 2020 the Supreme Court cannot at this time provide any comforting guarantee that they will.

26. It is also within my personal knowledge that throughout the months of June and July 2020 monumental efforts were expended by the Learned Chief Justice, Simmons J., the Registrar and Assistant Registrar of the Supreme Court of Bermuda, and other Court staff to secure alternative sites so that Supreme Court jury trials could be conducted. Such efforts included ascertaining the possible use of other areas in the Dame Lois Browne-Evans Building to hold jury trials, as well as the Bermuda College, a cruise ship arrivals/departure terminal, and school auditoriums. Unfortunately, none of those options would have ensured the tight security that jury trials would have required, and, the overall the practicality of conducting jury trials off-site would have been compromised, particularly in respect of security.

27. Strong consideration was also given to conducting jury trials remotely, however it was ultimately decided that the proper administration of justice could potentially be severely and negatively impacted. Particularly, the proper and undisturbed receipt of oral and documentary evidence electronically by jurors, and the creation of a safe and confidential environment via electronic means so that jury deliberations could occur, could not be guaranteed¹⁰.

28. So it is patently obvious that the Supreme Court of Bermuda has taken all reasonable and expeditious steps to have jury trials conducted post COVID-19 lockdowns. The bottom line though, at least from the Defendant's perspective, is whether or not there has been and will continue to be an unreasonable delay in the holding of his trial. Which, the Defendant argues, would ultimately result in him spending more time in custody than he should reasonably have to.

29. While it is correct that the Defendant's trial does not at this time have a fixed date I would not characterize the trial as having been "adjourned sine die". Cases that are adjourned sine die usually do not have any identifiable prospect of being heard, at least not in the short term. It is my understanding that the Supreme Court is primed to conduct the Defendant's trial on relatively short notice but for the unavailability of the Government funding to make the courtroom COVID-19

¹⁰ Other jurisdictions have tried remote or virtual jury trials but with mixed results.

compliant. Having said this, accused persons, whether in custody or not, should have some degree of certainty as to when their matters are going to be heard. Such certainty would not necessarily come from the fixing of a trial date (although it helps) but at the very least accused persons should see some measurable movement of their matter through the Court process. As I said in my 7th May Ruling, and which I now say with respect to this fourth bail application, the Defendant's matter has progressed through the Courts with reasonable expedition given all the circumstances. However, in the upcoming months all efforts must continue to be made in respect of scheduling the Defendant's trial and I would suggest that the Defendant, through his attorneys, is routinely informed about these efforts."

42. I repeat the above words for the purposes of this Ruling especially since the circumstances in the case at bar are far less serious than those in Trott. In particular, the defendant in Trott had been in custody for over three (3) years when he made his fourth bail application¹¹. I refused bail in Trott. As said earlier, the Defendant in this case has now been in custody for just about ten (10) months in which he has been through several criminal proceedings. On this basis alone, without any other factors impinging on the fixing of his trial date, I would conclude that even if the Defendant's trial is not heard until the beginning of 2021 that this would not amount to an unreasonable delay. However, when one factors in the effects of the COVID-19 pandemic on Court operations and the strenuous efforts taken by the Supreme Court to conduct jury trials and to protect jurors, I am even more fortified in my position that there would be still be no unreasonable delay if the trial of this matter is held between now and the beginning of 2021.
43. It is worth noting that subsequent to my decision not to grant bail to the Defendant, and before the date of these Reasons, that it was reported in the 21st August 2020 Edition of the Royal Gazette that the Honourable Mr. Neville Tyrrell, Acting Minister of Public Works, indicated that funding is available to carry out the necessary renovations at the Supreme Court so that it may be COVID-19 compliant and so that jury trials may be

¹¹ The ruling in Trott highlighted though that although the defendant had been in custody for three (3) years, he was not languishing at Westgate as he had been through extensive criminal proceedings which included multiple bail applications, multiple CMH's, a full blown jury trial, an appeal before the Court of Appeal of Bermuda, the commencement of a retrial, and a constitutional application before the Supreme Court.

conducted. Given this, the chances of the Defendant's trial being heard this side of 2020 have definitely increased.

44. In the circumstances, I am not satisfied that in the ensuing months that there will be any unreasonable delay in the hearing of the Defendant's trial.

Defendant unable to have visits at Westgate

45. Although the Defendant speaks about not being able to have visits at Westgate because of COVID-19 precautionary measures in paragraph 6 of his affidavit sworn on the 24th July 2020 Ms. Greening did little to advance or expand upon this ground at the bail hearing. In any event, I am not satisfied that this is a sustainable ground for bail to be granted to the Defendant.

46. As with the Courts, Westgate too has to respond to the COVID-19 pandemic so as to ensure the health and safety of its inmates, its prison officers, and those who visit Westgate (whether they may be loved ones or lawyers). I made mention of this in *Trott* when I noted that:

“34. One would suspect that prisons, being enclosed facilities, can be petri dishes for the incubation or spread of viruses and therefore Westgate must take every precaution to ensure the health and safety of its inmates and prison officers. This would invariably mean that they would be compelled to limit the number and times of persons visiting the facilities, whether they be loved ones or lawyers. Westgate simply cannot afford to have an outbreak within their walls because the consequences would be catastrophic. So while it may be unfortunate that inmates and their lawyers may not have the opportunity to see each other as much as they want to this is a reasonable consequence given the potentially far more devastating consequence of both the inmate and the lawyer contracting COVID-19 as a result of more frequent visits.”

47. I repeat these words for the purposes of this Ruling. Whilst it may be inconvenient for the Defendant to be quarantined and placed in a maximum security unit after he has had outside contact with others, this is for his benefit and that of others. Especially if the

Defendant has underlying health problems which he has repeatedly mentioned to the Court from the first time he appeared in Magistrates' Court.

48. Further, I heard nothing from Ms. Greening that would convince me that the Defendant has been denied his Clause 6(2)(c) constitutional right to have adequate time and facility to prepare his defence¹². For example, that he has not been able to instruct his three (3) lawyers or to receive legal advice from them. Indeed, to the contrary, it would appear that by instructing multiple lawyers, having multiple CMH's, and multiple bail applications, that the Defendant has had ample time and facility to prepare for his defence or for any other criminal proceeding.
49. I am therefore not satisfied that the limited visits at Westgate have been or will in any way whatsoever be detrimental to the Defendant.

Other defendants receiving bail with much more serious offences

50. In advancing this ground Ms. Greening did not draw the Court's attention to any particular cases where defendants were granted bail for more serious offence than those committed by the Defendant, but I accept that there have been others who have been charged with more serious offences such as murder or serious sexual assault and they were granted bail. However, and of course, each case must be decided on its own set of circumstances. In the case at bar, the Defendant is not only charged with extremely serious offences which could attract a lengthy prison sentence if convicted, but as Simmons J. concluded he is a flight risk as he is a foreign national whose real ties and roots are outside of Bermuda, and, that there is a risk that he will interfere with Prosecution witnesses in Bermuda if granted bail. These impactful factors for determination may not have been existent in other matters which have come before the Court.
51. This leads me to my next sub-heading.

¹² Clause 6(2)(c) of the Bermuda Constitution Order 1968

Other factors to consider in determining the Defendant's third bail application

52. In *Trott* I cited the Australian authorities of *Jason Brian Lynch v. Director of Public Prosecutions (No. 2)* [2020]QSC 64 (9th April 2020) (Queensland) and *Re Richardson* [2020] VSC 289 (22nd May 2020) (Victoria). Without going into much detail about the facts of those cases it is suffice to say that the applicants were being held in custody and that due to COVID-19 precautionary measures being taken by their respective Courts the issue was whether or not there would be an unreasonable delay in their trials being heard, and if so, whether the applicants should be granted bail. In both cases the presiding Justices concluded that the delay in bringing the matters to trial was unreasonable, however, it was still incumbent upon them, under their respective bail legislation, to then consider all of the circumstances in the case and determine whether there were any other reasons not to grant the applicants bail¹³. In other words, unreasonable delay was not enough to justify the granting of bail, and, that one had to also place into the balance other factors such as: risk of flight, witness tampering, strength of the prosecution's case, whether further offences may be committed by the applicant, or a failure to surrender to custody. The applicants in both *Lynch* and *Re Richardson* were denied bail when other factors were taken into consideration.
53. So even if I was satisfied that the Defendant's constitutional rights to a fair hearing in a reasonable time, and to have adequate time and facility to prepare his defence, would likely be infringed by COVID-19 precautionary measures being taken I still must consider whether there are substantial grounds for me to decline granting him bail.
54. The substantial grounds upon which the Defendant was denied bail when he first appeared in the Magistrates' Court and those which the Prosecution relied upon when the Defendant made his First Bail Application, still exist. Specifically:
- (a) The Defendant is still charged with an offence under the FA.

¹³ The Bail Act 1980 in Queensland and the Bail Act 1977 in Victoria

(b) There is still, I find, grave concern as to whether the Defendant will surrender to custody and whether he will flee the jurisdiction¹⁴. Simmons J. was clear in her conclusion that the Defendant was being untruth and unhelpful with respect to the location of his passport in the First Bail Application. It is equally unhelpful for the Defendant to now offer up his passport in this Third Bail Application as if the passport is a bargaining chip to obtain bail. If he was serious about exhibiting to the Court that he would not leave the jurisdiction then he could have, and probably should have, surrendered his passports¹⁵ back on 27th December 2019 when his First Bail Application was heard.

(c) There is still, I find, a concern that the Defendant will interfere with prosecution witnesses or obstruct the course of justice. Ms. Lightbourne, presumably the Prosecution's primary witness in respect of Count 2 on the Indictment, is the mother of the Defendant's daughter, it is her address to whom the Defendant allegedly sent component parts of firearms, and, it was her address at which the Defendant was arrested. The Defendant therefore knows exactly where Ms. Lightbourne resides and can, if he so desires, attend her residence and exert undue influence or pressure upon her.

I therefore disagree with Ms. Greening's assessment that there is no evidence to suggest that the Defendant would interfere with witnesses.

(d) The strength of the evidence against the Defendant is still strong. Presumably the Prosecution will rely upon the CCTV evidence allegedly depicting the Defendant mailing the subject package in respect of Count 1 on the Indictment; the oral and What's App evidence of Ms. Lightbourne in respect of Count 2 on the Indictment; and, the evidence that the subject package in Count 3 on the Indictment was

¹⁴ COVID-19 travel restrictions have now been lifted and commercial flights are now traveling to and from Bermuda.

¹⁵ The Defendant apparently has dual US and Bermuda citizenship.

addressed to the Defendant and that when arrested he allegedly uttered words which may point to his knowledge as to the contents of the said package.

Ms. Greening submits that the evidence against the Defendant is purely circumstantial evidence and that there are no forensics or DNA linking the Defendant to the packages. This argument has no wings as it is well accepted in the criminal courts that circumstantial evidence, if proven, can be just as persuasive as direct evidence.

55. The conclusions of Simmons J. after the Defendant's First Bail Application that he was untruthful and unhelpful as to his health status and the location of his passport should not be diminished. Nor should the opinion of Dr. Kayam that when he examined the Defendant that he found the Defendant to be uncooperative, evasive and unreliable when it came to his medical history and medication. Dr. Kayam ultimately found that the Defendant did not suffer from any heart condition despite the Defendant's continued representations in sworn affidavits that he did. These characterizations of the Defendant by Simmons J. and the Dr. Kayam strike at the core of the Defendant's apparent character¹⁶. If the Defendant has been untruthful, evasive and unreliable in respect of his health and passport then there is cogent and substantial grounds to believe that he will continue to be so in relation to any conditions if granted bail.

56. I do however agree with Ms. Greening that the photos purportedly of the Defendant from a social media page, without context, is insufficient for me factor them into my consideration as to the Defendant's character.

Conclusion

57. In consideration of the above paragraphs, I am not satisfied that:

¹⁶ A factor to which the Court may have regard pursuant to Paragraph 11(c) of Part 1 of Schedule 1 of the Bail Act.

- (i) There has been or that there will likely be any unreasonable delay in this matter;
- (ii) The Defendant has been or will likely be prejudiced by the reduced visits at Westgate.

58. I therefore decline to grant the Defendant's bail application and I do so for the following succinct reasons:

- (a) The Defendant is charged with offences under the FA;
- (b) The Defendant is charged with a serious arrestable offence involving a firearm;
- (c) There are substantial grounds to believe that the Defendant, if granted bail, will interfere with witnesses or obstruct the course of justice, and, that he will fail to surrender to custody;
- (d) The nature of the offences charged are serious.
- (e) The strength of the Prosecution evidence for all of the offences charged are strong.
- (f) The character of the Defendant is such that if granted bail he will not abide by any conditions of bail.

59. The Defendant is therefore further remanded into custody.

Dated the 28th day of August, 2020

The Hon. Acting Justice Juan P. Wolffe

